Clean Water Act Section 404 and USACE Permitting Process

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The views, opinions and findings contained in this report are those of the author(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.
Objectives

• Recognize the limits and extent of Corps jurisdiction and activities subject to regulation

• Permitting Process
  • Jurisdictional Determinations
  • Nationwide Permits
  • Standard Permits

• Example Scenario*
Geographic Jurisdiction

- Determining whether a particular aquatic resource is jurisdictional and therefore regulated under Corps authorities
Activity Jurisdiction

• Determining whether a particular activity is jurisdictional and therefore regulated under Corps authorities
Permit Process

• When Geographic Jurisdiction and Regulated Activity both exist, a permit is required under Corps authorities
Definitions

**Navigable waters**: waters subject to the ebb and flow of the tide; has a connection to transportation of interstate commerce

**Interstate commerce**: defined as had, presently has, or potential to have interstate commerce

**Determination of navigability**:
- Navigability Study
- Act of Congress
- Court Case
Regulatory Program Authorities
“Navigable Waters of the United States”

Section 9 of the Rivers and Harbors Act of 1899

• Corps authorizes dams and dikes across navigable waters of the U.S.
Section 10 of the Rivers and Harbors Act of 1899

- To protect and preserve the navigability of navigable waters
- Requires that you obtain a permit from the Regulatory Division for any **structure** or **work** in, over, or under a **navigable** water of the U.S.
Regulatory Program Authorities
“Navigable Waters of the United States”

Section 10 regulated activities include:

- buoys
- floats
- marinas
- bulkheads
- breakwaters
- dredging
- fill
- piers
- piling
- boatlifts
- boat ramps
- marine railways
- disposal of dredged material
Section 103 of the Marine, Research and Sanctuaries Protection Act of 1972

- The transportation of dredged material excavated from navigable waters of the U.S. for the purpose of dumping it in ocean waters 33 CFR 324.3(a)

- Disposal must not unreasonably degrade or endanger human health, welfare, marine environment, or ecological systems
Regulatory Program Authorities

“Waters of the United States”

Section 404 of the Clean Water Act

• To restore and maintain the chemical, physical and biological integrity of the waters of the U.S.

• Requires that you obtain a permit from the Regulatory Division for the discharge of dredged or fill material in any Water of the U.S.
Scope of the Clean Water Act

• Navigable Waters
  • For example: oceans, bays, and inlets
• Tributaries to navigable waters
  • For example: rivers and creeks, ephemeral and intermittent streams
  • Lakes and ponds
• Interstate bodies of water or wetlands
• Intrastate bodies of waters or wetlands with an interstate commerce connection
• Wetlands adjacent to the waters listed above
• Special aquatic sites: sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle and pool complexes
Current practice for Jurisdictional Determinations

**March 2000 Regulation (Final Rule for Appeal Process):** Definitions for JD, PJD, and AJD appear in regulation. Introduces concept of AJD determination (presence/absence) and AJD delineation (defines boundaries).

**RGL 05-05:** Guidance on Ordinary High Water Mark (OHWM) Identification

**Rapanos Guidance:** 2007/2008 Coordination Memos: Introduced new AJD form and further standardized the JD process (including coordination).
- Included 9 month public comment period.
- 66,047 Comments received; revised guidance (2008).

**RGL 08-02:** Further defined difference between PJD and AJD and introduced PJD form.
Current practice for Jurisdictional Determinations

**2015 Clean Water Rule:** Final rule became effective on August 28, 2015. Further defined scope of waters protected under the Clean Water Act.

- In effect for approximately 6 months, and was stayed in Federal Court
- Applicability Date rule concerning the 2015 Rule was issued on 06 February 2018 where EPA and Army delayed implementation of the 2015 Rule until February 2020.
- U.S. District Court for the District of South Carolina entered an order and judgment enjoining “applicability rule” on 16 August 2018.
- This means that the 2015 Rule is now in effect in 26 states.
Blue = Implementing 2015 Rule (plus territories)
Orange = Enjoined from using 2015 Rule
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>• Includes all Traditional Navigable Waters (TNWs).</td>
<td>• (a)(1) waters.</td>
</tr>
<tr>
<td>• Includes all interstate waters.</td>
<td>• (a)(2) waters.</td>
</tr>
<tr>
<td>• Includes all territorial seas.</td>
<td>• (a)(3) waters.</td>
</tr>
<tr>
<td>• Includes all impoundments.</td>
<td>• (a)(4) waters.</td>
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</table>
### Tributaries

<table>
<thead>
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<tbody>
<tr>
<td>• 1986 Regulation:</td>
<td>• (a)(5) waters.</td>
</tr>
<tr>
<td>➢ Includes all tributaries.</td>
<td>• Includes all tributaries.</td>
</tr>
<tr>
<td>• Under 2008 guidance:</td>
<td>• All waters that meet the definition of tributary (has indicators of bed and banks/OHWM and contributes flow to the downstream waters) are jurisdictional by rule.</td>
</tr>
<tr>
<td>➢ Jurisdiction over RPW tributaries of TNWs; SND for non-RPWs.</td>
<td></td>
</tr>
<tr>
<td>➢ Coordination required for SNDs.</td>
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</table>

* SND = significant nexus determination  
* RPW = relatively permanent water

- Perennial flow  ➔ RPW
- Intermittent flow (flows > 3 months)  ➔ RPW
- Intermittent or Ephemeral flow (flows < 3 months)  ➔ Non-RPW*
- Section 10 navigable water  ➔ TNW
<table>
<thead>
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</thead>
<tbody>
<tr>
<td>•1986 Regulation:</td>
<td>•(a)(6) waters.</td>
</tr>
<tr>
<td>➢ Includes all adjacent wetlands.</td>
<td></td>
</tr>
<tr>
<td>➢ Defines adjacent as bordering,</td>
<td>•All waters “adjacent” to (a)(1)-(a)(5) waters are jurisdictional by rule.</td>
</tr>
<tr>
<td>contiguous, or neighboring.</td>
<td></td>
</tr>
<tr>
<td>•Under 2008 Guidance:</td>
<td></td>
</tr>
<tr>
<td>➢ Certain adjacent wetlands</td>
<td>•Includes wetlands, ponds, lakes, oxbows, impoundments, and similar waters.</td>
</tr>
<tr>
<td>require SND to determine</td>
<td>•Includes new definition of “adjacent” and “neighboring.”</td>
</tr>
<tr>
<td>jurisdictional status.</td>
<td>•Neighboring includes specific thresholds for “bright lines.”</td>
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</tbody>
</table>
### Other Waters/Case-Specific Waters

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<tbody>
<tr>
<td>• Includes all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.</td>
<td>• (a)(7) and (a)(8) waters.</td>
</tr>
<tr>
<td>• As of the 2001 SWANCC decision neither the Corps nor EPA have asserted jurisdiction over these “other waters”/isolated waters.</td>
<td>• “Case-specific significant nexus” waters.</td>
</tr>
<tr>
<td></td>
<td>• See following slides.</td>
</tr>
</tbody>
</table>
### (a)(7) and (a)(8) Waters

<table>
<thead>
<tr>
<th>Final Rule (a)(7) Waters</th>
<th>Final Rule (a)(8) Waters</th>
</tr>
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<tbody>
<tr>
<td>• Five specific categories of waters in certain regions:</td>
<td>• Waters located within the 100-year floodplain of (a)(1) through (a)(3) water.</td>
</tr>
<tr>
<td>➢ (i) Prairie Potholes;</td>
<td>• Waters located within 4,000 feet of the HTL or <strong>OHWM</strong> of an (a)(1) through (a)(5) water.</td>
</tr>
<tr>
<td>➢ (ii) Carolina and Delmarva Bays;</td>
<td>• Require a SND to determine whether a WoUS.</td>
</tr>
<tr>
<td>➢ (iii) Pocosins;</td>
<td></td>
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<tr>
<td>➢ (iv) Western Vernal Pools;</td>
<td></td>
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<tr>
<td>➢ (v) Texas Coastal Prairie Wetlands</td>
<td></td>
</tr>
<tr>
<td>• Determined similarly situated by rule.</td>
<td></td>
</tr>
<tr>
<td>• Require a SND to determine whether a WOTUS.</td>
<td></td>
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</tbody>
</table>
### Waters and Features That Are Not WOTUS

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>1986 Regulations exclude:</strong></td>
<td>• Excluded waters/features, even if they otherwise meet (a)(4)-(a)(8) categories:</td>
</tr>
<tr>
<td>➢ Waste treatment systems.</td>
<td>• WTSE and PCC.</td>
</tr>
<tr>
<td>➢ Prior converted croplands.</td>
<td>• Certain ditches.</td>
</tr>
<tr>
<td><strong>1986 Preamble identifies features that are “generally” not considered WOTUS.</strong></td>
<td>• Groundwater.</td>
</tr>
<tr>
<td></td>
<td>• Stormwater control features.</td>
</tr>
<tr>
<td></td>
<td>• Wastewater recycling structures.</td>
</tr>
<tr>
<td></td>
<td>• Others features similar to 1986 Preamble waters.</td>
</tr>
<tr>
<td></td>
<td>• Erosional features and lawfully constructed grassed waterways.</td>
</tr>
<tr>
<td></td>
<td>• Puddles.</td>
</tr>
</tbody>
</table>
Implementing Executive Order 13778

- EPA and Army are implementing Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, in two steps to provide certainty to the regulated community and the public while the agencies develop a revised definition of "waters of the United States."

- **Step One - Repeal** - The agencies are proposing to repeal the 2015 Rule and recodify the regulation that was in place prior to issuance of the 2015 Rule.
  - The public comment period closed on August 13, 2018.

- **Step Two - Revise** - On February 14, 2019, the agencies published a proposed definition that would replace the approach in the 2015 Rule and the pre-2015 regulations, taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.
  - The public comment period closed on April 15, 2019

- Further info can be found at: [https://www.epa.gov/wotus-rule](https://www.epa.gov/wotus-rule)
Proposed Revised Definition of “Waters of the United States”

- Lakes and Ponds
- Intermittent Tributary
- Perennial Tributary
- Adjacent Wetlands
- Jurisdictional Ditch
- Impoundment
- Excluded Ditch
- Excluded Prior Converted Cropland
- Excluded Ephemeral Streams
- Excluded Pond
- Intermittent Tributary
- Adjacent Wetlands
- Traditional Navigable Waters

* For illustrative purposes only. Proposed jurisdictional waters in **bold**.
What is the Ordinary High Water Mark?

“The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presences of letter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” [33 CFR 328.3(e)]

The OHWM demarcates the lateral extent of Federal jurisdiction for:

- **Sections 9 and 10** of the Rivers and Harbors Act of 1899
- **Section 404** of the Clean Water Act
Regulatory Guidance Letter 05-05

- Natural line impressed on the bank
- Shelving
- Changes in the character of soil
- Destruction of terrestrial vegetation
- Presence of litter and debris
- Wracking
- Vegetation matted down, bent or absent
- Change in plant community
- Sediment sorting
- Leaf litter disturbed or washed away
- Scour
- Deposition
- Multiple observed flow events
- Bed and banks
- Water staining

2003/2008 Guidance
Only need two OHWM characteristics

2015 Clean Water Rule: Tributaries
Requires bed and bank in addition to one more physical characteristic
Wetland Definition

Corps/EPA definition for Clean Water Act Section 404 purposes:

- Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions

33 CFR 328.3(b)
Geographic Jurisdiction + Regulated Activity = Permit Process
Jurisdictional Determinations (JDs)

Written determination detailing the limits (OHWM, MHW, HTL, wetland boundary) of waters of the U.S. in the review area.
Jurisdictional Determinations

Preliminary (PJD)
- Valid for a specific project
- Only applicable to waters of the U.S.
- Not appealable
- No coordination with other agencies is required

Approved (AJD)
- Valid for 5 years
- Applicable to waters of the U.S. and non-waters of the U.S.
- Appealable
- In certain circumstances (Rapanos vs. 2015 CWR), coordination with EPA and HQ is required
Jurisdictional Determinations - What do we need?

1. Property Owner
2. Purpose (i.e. residential development)
3. Date of site visit
4. Recent weather conditions
5. Vicinity map
6. Wetland determination data forms
7. Site map
8. Completed waters table
9. Wetland delineation methodology
10. Stream delineation methodology
11. Photographs
12. Description of site
13. Summary of info
14. Narrative description of results

***Before Site Visit***
1. Landowner permission
2. Flag beginning and end/boundaries of waters
3. Flag flow regime transitions
4. Label each water appropriately

https://www.lrn.usace.army.mil/Missions/Regulatory/Forms-and-Publications/
LRN-20XX-XXXX
Proposed Mitigation Bank
Example JD Map

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LRN-20XX-XXXX
Proposed Mitigation Bank
Example Waters Table
I need a permit...Now what?

**General Permits**

**Regional Permits (RP)** – developed by the District Commander (DC) for particular categories of activities specific to a region

**Programmatic General Permits (PGP)** – developed by the DC to provide Corps authorization to minor activities adequately covered by state law; “one stop shopping”.

**Nationwide Permits (NWP)** – Authorized nationwide for commonly recurring activities having minimal cumulative adverse impacts to the aquatic environment

**Individual Permits**

**Individual Permit (IP)** – projects with potential for substantial environmental impacts, requiring public notice and coordination and public interest review

**Letter of Permission (LOP)** – projects with minor impacts, abbreviated coordination and review
Nationwide Permits

- Account for 90% of workload
- Re-issued every 5 years
- Currently 52 NWPs (Issued March 19, 2017 and will expire March 18, 2022)
- All have standard general conditions and may have special and/or regional conditions
- Some have Pre-construction notification requirements
- 45 day processing time
- Waivers possible in some cases
Nationwide Permits

1. Aids to Navigation
3. Maintenance
12. Utility Lines
13. Bank Stabilization
14. Linear Transportation Projects
18. Minor Discharges
27. Aquatic Habitat Restoration, Establishment, and Enhancement
29. Residential Developments
39. Commercial and Institutional Developments
## Nationwide Permits

### Summary of the 2017 Nationwide Permits

<table>
<thead>
<tr>
<th>Nationwide Permit</th>
<th>Statutory Authority</th>
<th>Limits</th>
<th>Pre-Construction Notification (PCN) Threshold</th>
<th>Delineation Required?</th>
<th>Applicable Waters</th>
<th>Changes</th>
<th>Other Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>NWP 1 – Adds to Navigation</td>
<td>10</td>
<td>none</td>
<td>PCN not required</td>
<td>no</td>
<td>navigable waters of the U.S.</td>
<td>none</td>
<td></td>
</tr>
<tr>
<td>NWP 3 – Maintenance</td>
<td>10/404</td>
<td>authorizes only minor deviations for maintenance</td>
<td>PCN not required</td>
<td>no</td>
<td>all waters of the U.S.</td>
<td>Clarity that NWP authorizes removal of previously authorized structures and fills</td>
<td>Does not authorize maintenance dredging for the primary purpose of navigation; beach restoration; or new stream channelization or stream relocation projects. Limits stream channel modification to the minimum necessary for the maintenance activity.</td>
</tr>
<tr>
<td>(a) Repair, rehabilitation, or replacement of previously authorized, currently servicable structures or fills</td>
<td>200 feet from structure; minimum necessary to restore capacity intake or outfall or associated canal</td>
<td>all activities</td>
<td>yes</td>
<td>all waters of the U.S.</td>
<td>Remove provision authorizing placement of new or additional riprap to protect the structure (rip rap may be authorized by NWP 13).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) Temporary structures, fills, and work necessary to conduct maintenance activity</td>
<td>PCN not required</td>
<td>no</td>
<td>all waters of the U.S.</td>
<td>Clarity that NWP authorizes use of temporary mats, if regulated by the district.</td>
<td>Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NWP 14 – Linear Transportation Projects</td>
<td>10/404</td>
<td>• 1/2 acre in non-tidal waters • 1/3 acre in tidal waters</td>
<td>yes, if PCN required</td>
<td>all waters of the U.S.</td>
<td>Add notes referencing concepts from definition of “single and complete linear project” and 33 CFR 330.6(d).</td>
<td>Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. Does not authorize storage buildings, parking lots, train stations, aircraft hangars, or other non-linear transportation features.</td>
<td></td>
</tr>
<tr>
<td>NWP 29 – Residential Developments</td>
<td>10/404</td>
<td>• 1/2 acre • 300 linear feet of stream bed, but DE can waive for intermittent and ephemeral streams</td>
<td>yes</td>
<td>non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters</td>
<td>Clarity that any losses of stream bed are applied to the 1/2-acre limit.</td>
<td>For residential subdivisions, the aggregate total loss of waters of the U.S. cannot exceed 1/2-acre.</td>
<td></td>
</tr>
</tbody>
</table>
Complete Application for a Nationwide Permit

Information necessary for a complete Pre-Construction Notification, per National General Condition 32:

- Name, address, and telephone number of applicant
- Location
- Request and identify the specific applicable NWP or NWP(s)
- Description of proposed activity
- Purpose and need
- Direct and indirect adverse environmental effects
- Description of proposed mitigation
- List of other authorizations
Complete Application for a Nationwide Permit

Information necessary for a complete Pre-Construction Notification, per National General Condition 32, cont:

- Delineation of wetlands, other special aquatic sites, and other waters
- Name of protected species under ESA
- Identification of potentially affected historic properties
- Identification of wild and scenic river (if applicable)
- Submit a written statement that section 408 permission has been requested (if applicable)

➢ Other requirements per National Conditions for specific NWPs
➢ Other requirements per Regional Conditions

IPaC is a project planning tool which streamlines the USFWS environmental review process

https://www.lrn.usace.army.mil/Missions/Regulatory/Forms-and-Publications/
Typical Processing Procedure for a Nationwide Permit

1. Pre-application consultation (optional)
2. Applicant submits ENG Form 4345 to district regulatory office*
3. Application received and assigned identification number (LRN-2019-XXXXX)
4. If complete, Corps begins review process. If incomplete, RAI sent to applicant
5. Application is reviewed** by Corps
6. Other Federal agencies consulted, if appropriate
7. District engineer makes decision
8. Permit Issued or Permit denied and applicant advised of reason

* A local variation, often a joint federal-state application form may be submitted
** Review period may be extended if applicant fails to submit information or due to requirements of certain laws
Individual Permits

- Generally reserved for projects with potential for substantial environmental impacts
- 120 day review period
- Public Notice
- Coordination with involved agencies, interested parties, and the general public
- Full public interest review (PIR)
  - Conservation
  - Economics
  - Aesthetics
  - General Environmental Concerns
  - Wetlands
  - Fish and Wildlife Values
  - Historic Properties
- Land Use
- Navigation
- Recreation
- Water Quality
- Needs and welfare of people
Complete Application for an Individual Permit

An application is complete when:

- Sufficient information is received to prepare the Public Notice (PN)
- The evaluation clock begins with a complete application
Complete Application for an Individual Permit

Information necessary to prepare a PN includes:

- Location
- Purpose and need
- Description of proposed activity
  - Location (lat/long, section, township, range, waterway, city, county)
  - Scheduling
  - Names and address of adjoining property owners
  - Location and dimensions of adjacent structures
  - List of other authorizations
- Direct and indirect adverse environmental effects of activity
  - Site specific effects, types of resources, etc
  - Efforts to avoid and minimize impacts
  - Mitigation statement
- Delineation of aquatic resources
- Projects drawings/sketches
- List of adjacent property owners
- Construction schedule
Complete Application for an Individual Permit

Information necessary to prepare a PN includes:

- If activity involves dredging:
  - Type, composition and quantity of material to be dredged
  - Method of dredging
  - Site and plans for disposal of dredged material
    » For disposal activities in waters of the U.S.
      - Source of material
      - Method of transportation and disposal of material
      - Location of disposal site
  - If activity involves construction of an impoundment, must provide documentation to show the proposal will comply with State dam safety criteria

- Signature of applicant
Complete Application
Request for Additional Information (RAI)

Review application within 15 days of receipt;

Request essential information within 15 days of receipt

• Simplify the means for request
• Provide a timeframe for applicant’s response
• Withdraw at the applicant’s request
• Withdraw if applicant fails to respond
Public Notice

- Is the primary method of advising all interested parties of a proposed activity for which a permit is sought
- Solicits agency and public comment for input in the decision making process
- Should go out 15 days after receipt of a complete application
  - 15/30 day comment period
PUBLIC NOTICE

US ARMY CORPS OF ENGINEERS

SUBJECT: Proposed expansion of existing industrial facility in Knoxville, Knox County, Tennessee.

TO ALL CONCERNED: The application described below has been submitted for a Department of the Army (DAA) permit pursuant to Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344). Application (AARAP No. ) has also been made to the State of Tennessee, Department of Environment and Conservation, Division of Water Resources for a water quality certification pursuant to Section 401(a)(1) of the CWA (33 U.S.C. 1344).

APPLICANT:


DESCRIPTION OF PROPOSED WORK: The applicant proposes expand an existing industrial facility on its own property, which includes the deposition of fill material onto 1.4 acres of jurisdictional wetlands.

Plans and location maps of the proposed project are provided in this notice. If you wish to view additional plans, please contact the office or visit our website at:
Complete Application for an Individual Permit

Information needed for USACE to make a permit decision

- Alternatives analysis
  - Purpose and need
  - Avoidance and minimization
- National Historic Preservation Act Compliance
- Endangered Species Act Compliance
- Compensatory Mitigation
- Water Quality Certification
Typical Processing Procedure for a Standard Individual Permit

1. Pre-application consultation (optional)
2. Applicant submits ENG Form 4345 to district regulatory office*
3. Application received and assigned identification number (LRN-2019-XXXXX)
4. If complete, Public Notice issued (within 15 days of receiving information). If incomplete, RAI and issue Public Notice after complete application received.
5. 15 to 30 day comment period depending on nature of activity
6. Proposal is reviewed** by Corps and:
   - Public
   - Special interest groups
   - Local agencies
   - State agencies
   - Federal agencies
7. Corps considers all comments
8. Other Federal agencies consulted, if appropriate
9. District engineer may ask applicant to provide additional information
10. Public hearing held, if needed
11. District engineer makes decision
12. Permit Issued or Permit denied and applicant advised of reason

* A local variation, often a joint federal-state application form may be submitted
** Review period may be extended if applicant fails to submit information or due to requirements of certain laws
Permitting Example

1. Jurisdictional Determination
   • PJD vs. AJD

2. Type of Permit?
   • Activity
   • Amount of Impacts
Questions?